

1  
2 UNITED STATES BANKRUPTCY COURT

3 EASTERN DISTRICT OF NEW YORK

4 Case Nos. 09-49040 (CEC) ; 09-51313 (CEC) ; 10-44189 (CEC)

5 -x

6 In the Matters of:

7 PREVENTION I, INC.,

8 Debtor.

9 -x

10 304 WASHINGTON AVENUE, INC.,

11 Debtor.

12 -x

13 MICHAEL I. FISCHMAN and SHOSHANNA FISCHMAN,

14 Debtors.

15 -x

16 United States Bankruptcy Court

17 271 Cadman Plaza East

18 Brooklyn, New York

19  
20 November 3, 2010

21 3:27 PM

22  
23 B E F O R E:

24 HON. CARLA E. CRAIG

25 CHIEF U.S. BANKRUPTCY JUDGE

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ORDER Scheduling Status Conference for the Purpose of  
Determining an Appropriate Schedule for the Proper  
Administration of This Case (09-49040(CEC) [9])

MOTION to Dismiss Case or, in the Alternative, Convert Chapter  
11 Case to Chapter 7 (09-49040(CEC) [25])

ORDER Scheduling Status Conference for the Purpose of  
Determining an Appropriate Schedule for the Proper  
Administration of This Case (09-51313(CEC) [10])

MOTION to Dismiss Case or, in the Alternative, Convert Chapter  
11 Case to Chapter 7 (09-51313(CEC) [64])

MOTION to Dismiss Case or, in the Alternative, Convert Chapter  
11 Case to Chapter 7 (10-44189(CEC) [50])

ORDER Scheduling Status Conference for the Purpose of  
Determining an Appropriate Schedule for the Proper  
Administration of This Case (10-44189(CEC) [7])

Transcribed by: Lisa Bar-Leib

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## MICHAEL FISCHMAN AND SHOSHANNA FISCHMAN

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1 P R O C E E D I N G S

2 THE CLERK: Calling Fischman, Prevention I and 304  
3 Washington. Appearances, please.

4 MR. GREENWALD: Good afternoon, Your Honor. Wayne  
5 Greenwald with Wayne Greenwald, P.C., attorney for the debtors.  
6 Also with me is Michael Fischman, who is one of the debtors'  
7 principal corporate debtor, and Hal Korcarz who is the  
8 accountant.

9 MR. CURTIN: William Curtin for the United States  
10 trustee, Your Honor.

11 MR. NAGI: Jason Nagi from the law firm of Polsinelli  
12 Shughart on behalf of City National Bank, Your Honor. We filed  
13 notices of presentment for us to be substituted as counsel in  
14 In re Fischman. And we also filed a notice of appearance in  
15 the --

16 MR. GREENWALD: Prevention I.

17 MR. NAGI: -- Prevention I matter. We can present  
18 Your Honor with chambers copies at this time if Your Honor  
19 would like.

20 THE COURT: That's not necessary.

21 MR. NAGI: Thank you.

22 THE COURT: You may be seated. All right. Mr.  
23 Curtin, should we start with your motion?

24 MR. CURTIN: Thank you, Your Honor. William Curtin  
25 for the United States trustee. Your Honor, we have two

1 recently filed motions or semi-recently filed motions and one  
2 motion that's been pending for some time. What we're seeking  
3 is conversion of all three cases: the Fischman case, 304  
4 Washington Avenue Inc. and Prevention I. Your Honor, all of  
5 these -- this story started in this Court approximately a year  
6 ago. And Mr. Fischman, of course, is the principal of  
7 Prevention I which was the first case to file. So he has been  
8 before Your Honor in one capacity or another for at least a  
9 year. And that will become relevant when I address the  
10 opposition that was filed.

11 I'd like to start with the Fischman cases, Your Honor,  
12 because the other cases are, of course -- the facts are  
13 similar. Your Honor, we seek dismissal of the Fischman under -  
14 - for several reasons. The first has to do with -- and I'll  
15 start with the easier grounds. One has to do with the timely  
16 filing of operating reports. Your Honor, at this time, the  
17 operating reports that are outstanding have been filed but they  
18 have been consistently filed in an untimely manner.

19 Secondly, with regard to orders, disobeying orders of  
20 the Court, 1112(b)(4)(E), there are two orders that we raise in  
21 the motion. And in fact, as I'll go through when I go through  
22 the opposition, the debtor, in fact, admits that it has not  
23 followed those orders. Those two orders are, first, the con --  
24 what we refer to as the controlled entity reporting order which  
25 Your Honor is familiar with because Mr. and Mrs. Fischman are

1 individual debtors and they own or control certain nondebtor  
2 entities, they're required to -- under Rule 2015, as well as  
3 the order expanding the requirements of 2015 that the Court  
4 entered they're required to file controlled entity reports  
5 regarding those nondebtor entities. They filed certain of  
6 those reports. However, they did not file the report as the  
7 motion points out for an entity called Carriage House. And  
8 again, I'll get into that when I go through the opposition. If  
9 Your Honor will indulge me, I'd like to go through the  
10 opposition.

11 THE COURT: Okay. Give me the date when that order  
12 was entered. And this is entered in the Fischman individual --

13 MR. CURTIN: This is entered in the Fischman matter,  
14 Your Honor. Just give me one moment. It should be ECF number  
15 19, Your Honor. It should have been entered on July 2nd, I  
16 believe.

17 THE COURT: Okay. Thank you.

18 MR. CURTIN: And the second order, Your Honor, which  
19 in the opposition which I'll go through, the debtor admits it  
20 didn't follow is the order that Your Honor entered for Fannie  
21 Mae's -- in granting Fannie Mae's motion to lift the stay and  
22 requiring certain documents be turned over both to Fannie Mae  
23 and also to the United States trustee by date certain which, of  
24 course, didn't happen. The information purportedly is provided  
25 or attached to the opposition. I haven't been able to reach

1 Fannie Mae's counsel and they're not here today so I don't know  
2 if that's exactly what was supposed to be provided, but, quite  
3 frankly, it's irrelevant. And just for the record, I'm  
4 referring to the August 26th order of this Court which is ECF  
5 number 48 on the docket which required, in relevant part, the  
6 debtors to provide an accounting which I refer to in the motion  
7 as the Yakaputz accounting to the Court, Fannie Mae and the  
8 United States trustee no later than September 1st, 2010,  
9 identifying the sources and use of all rents and security  
10 deposits that came into the debtors' possession after the  
11 petition date. And as I mentioned, that did not happen,  
12 certainly did not happen even remotely timely and still I'm not  
13 even sure whether it actually did happen.

14 The -- with regard to the gross mismanagement, Your  
15 Honor, we lay out literally pages of examples of gross  
16 mismanagement. But it really -- it centers around the debtors'  
17 use of an entity, a nondebtor entity known as Albany Commons,  
18 which is purported to be a management company and in many  
19 senses does operate as a management company for the debtors'  
20 properties. However, in looking at the reports that were filed  
21 by the debtor, both the operating repots and the controlled  
22 entity reports, it became apparent that funds were coming in to  
23 Albany Commons from the various real estate entities including  
24 the two debtor entities, 304 Washington and Prevention I, and  
25 then going out of Albany Commons to pay personal expenses. So,

1 as I point out in the motion, it's somewhat of a new twist on  
2 an old story where it's not the debtor paying the personal  
3 expenses but it's really the same thing because the money's  
4 coming in and then going out to pay those personal expenses.

5 Your Honor, if you'll indulge me, I'd just like to go  
6 through the opposition because I think it's relevant in the  
7 sense that it admits many -- many of the allegations, the  
8 factual allegations that are raised in the motion. And my  
9 position would be that based upon those admissions, all that's  
10 left is for the Court to make a legal determination as to  
11 whether those allegations, as admitted, constitute cause to  
12 convert this case.

13 And, Your Honor, I'll just -- for -- trying to figure  
14 out the easiest way to do this, I think I'm just going to go  
15 through the opposition in order by paragraph I think is really  
16 the only way to do it because as Your Honor can tell, there's a  
17 lot of facts here and there -- it's really -- it seems more  
18 burdensome than it is. When it's boiled down, it's really not  
19 very complicated.

20 First of all, the debtors admit, paragraph 8 and in  
21 paragraph 9, they make the statement that "The Debtors, through  
22 the reorganization process, are learning how to manage their  
23 entities better." Your Honor, I couldn't let that go without  
24 commenting. Obviously, the Court knows that this is not -- the  
25 purpose of Chapter 11 is not for a debtor to learn how to



1 operate its entities. And even if it is, even if some argument  
2 could be made that in the initial stages of the case that may  
3 be the practical reality, as I pointed out, Your Honor, the  
4 debtors' principal and the debtor have been before the Court in  
5 one capacity or another for a year. There's three pending  
6 bankruptcy cases. And as they admit in paragraph 8, they, at  
7 least for the past several months, have had the assistance of  
8 an accountant. So the we-made-a-mistake excuse, which comes up  
9 over and over again in the opposition, is not even as  
10 compelling as it might be in other situations. And remarkably,  
11 in paragraph 18, the debtor talks about now employing two  
12 bookkeepers with whom he works daily -- again, as we point out,  
13 the money in this case is extremely tight and now we're talking  
14 about two additional employees. And as I pointed it out, even  
15 up through the September operating reports which are the most  
16 recent that we have, the mismanagement continues. Okay.

17 With regard to the debtors' allegation on -- in  
18 paragraph 27 which states, and I'll read, "It was agreed upon  
19 by the Debtors' professionals and the Trustee's office that  
20 continuing Albany Commons as management for the Debtors' four  
21 Albany, New York properties was appropriate." Now that's not  
22 entirely accurate, Your Honor. The Albany Commons' existence,  
23 of course, was disclosed to the U.S. trustee and to the Court  
24 and the debtor has been reporting. But what the debtor seems  
25 to misunderstand is that reporting alone is not what's

1 required. The reporting gives us the information. And when we  
2 discovered the mismanagement based upon the reporting, it  
3 doesn't mean that just because the reporting was okay that  
4 everything is okay.

5 Secondly -- and this would be one of the admissions  
6 that I was pointing out with regard to the 1112(b)(4)(E) cause  
7 of action. And that's at paragraph 29 and 30. It admits that  
8 no controlled entity reports were filed for Carriage House.  
9 And somewhat incredulously in paragraph 30, it says that the  
10 debtor was not aware or did not remember hearing during the  
11 trustee's initial meeting that reports for this entity were  
12 required. Now certainly, this reporting was discussed at the  
13 meeting. But the obligation, of course, comes from both the  
14 Code -- or, I'm sorry, the rules and this Court's order which  
15 says all entities and I believe might even mention them by  
16 name.

17 THE COURT: Well, let's look.

18 MR. CURTIN: I was going -- I don't have the order  
19 itself.

20 THE COURT: I'm looking at it.

21 MR. CURTIN: I believe that -- and --

22 (Pause)

23 THE COURT: Okay. No. That's a different order.

24 MR. CURTIN: Your Honor, but when I sit down --

25 THE COURT: Give me the date on that order again.

1 MR. CURTIN: July 2nd, Your Honor. And I have it  
2 somewhere in that stack. When I sit down, I'm sure I can find  
3 it.

4 (Pause)

5 THE COURT: It was -- the order directed the debtors  
6 to file reports containing information with regards to any  
7 entity in which there holds a controlling or a twenty percent  
8 interest including the entities which included -- which were  
9 named --

10 MR. CURTIN: And, Your Honor --

11 THE COURT: -- and which specifically included  
12 Carriage House Development.

13 MR. CURTIN: Okay. Thank you, Your Honor. I  
14 apologize for not having that order --

15 THE COURT: No. Go ahead.

16 MR. CURTIN: -- in front of me. Next, Your Honor --  
17 the next admission comes at paragraph 36 and 37. And that  
18 refers to the August 26th order which, as I read before,  
19 required the accounting to be turned over to -- to be filed  
20 with the Court and turned over to us and turned over to Fannie  
21 Mae's counsel. And in paragraph 37, the debtor admits that it  
22 failed to provide that accounting.

23 Moving on to -- and, Your Honor, I kind of glossed  
24 over it but in the beginning of the motion, the debtor  
25 discusses -- let's find the paragraph -- with regard to the

1 operating report allegation -- I refer Your Honor to paragraph  
2 10 regarding preparing the monthly operating reports being an  
3 onerous task, and 13, where he says there were improvements in  
4 filing the report. And specifically, number 12 where it says  
5 that the reports were not submitted in as timely a manner as  
6 the debtor would have liked. While it's not as clear an  
7 admission as some of the others, it certainly acknowledges that  
8 the reporting in this case hasn't been timely.

9 Your Honor, with regard to the gross mismanagement  
10 that's alleged in the motion, the admissions with regard to  
11 that cause of action start on paragraph 41 on page 6 of the  
12 opposition. And I want to point Your Honor's attention to  
13 certain words in the opposition starting in paragraph 42 where  
14 the debtors -- it talks about the Fischmans using Albany  
15 Commons debit card when they either had no cash available or an  
16 item, and I quote, "usually construction related". So, in  
17 other words, they're saying that in certain cases as we point  
18 out, these expenses were not construction or real estate  
19 related. The debtors then going into, starting at paragraph  
20 43, the fact that they do not have a credit or debit card and  
21 that the debit or credit card of Albany Commons had to, in  
22 their position -- their position is that the Albany Commons  
23 debit card had to be used for these expenses because they  
24 didn't have another card. Your Honor, it's not a convincing  
25 argument. It's still -- the bottom line is that personal

1 expenses were paid from Albany Commons. We've pointed them out  
2 in the motion. They -- the debtors state, at paragraph 44,  
3 that the items have been paid back to Albany Commons. However,  
4 as we progress through the opposition, you'll see that they  
5 even admit that they haven't all been paid back. And I would  
6 submit to you that paying it back is great. It's still gross  
7 mismanagement to do it in the first place. But it certainly is  
8 gross mismanagement when certain of those expenses haven't been  
9 repaid. And specifically, I would refer Your Honor to  
10 paragraph 54 where the opposition states that "there was one  
11 personal expense of \$179.50 for theater tickets which has not  
12 been repaid" -- I'm sorry -- "which was not repaid". And also  
13 paragraph 55, where the debtor talks about an approximately  
14 thirty dollar payment to Club Penguin for a personal expense  
15 related to the debtors' daughter which also is not repaid.

16 Those are the outright admissions. And then we get,  
17 in paragraph 53, an admission that a personal expense for a car  
18 for Mr. Fischman was paid -- a rental car for Mr. Fischman of  
19 just over 300 dollars was paid. And then, if Your Honor will  
20 recall in the motion, a couple of the expenses that we pointed  
21 out as examples were from a spa facility. The debtor alleges  
22 that the spa charges, of which there were a few, were for  
23 treatment of an injury incurred during construction.

24 Your Honor, moving on and again focusing on the  
25 language of the opposition, in paragraph 691, the debtor notes

1 that we questioned a \$573.67 expense. And the debtors'  
2 response to that is the debtors believe that these monies were  
3 used for building supplies for 304 Washington Avenue -- again,  
4 a debtor with an accountant, with an attorney that's been  
5 before Your Honor for over a year.

6 Moving on, Your Honor, to another example beyond the  
7 comingling of gross mismanagement and that is the hiring and  
8 payment of professionals without a court order. Your Honor, we  
9 raised that in the motion. And in paragraphs 74 and 75, the  
10 debtors admit that they did, in fact, retain this appraiser and  
11 did, in fact, pay the appraiser and they didn't seek court  
12 approval for either the retention or for the payment.

13 Going back to the comingling piece of the gross  
14 mismanagement and moving on to the next phase of the  
15 opposition, in paragraph 77, when we point out certain  
16 discrepancies between the rent roll and the reported income of  
17 which there are several which continue to this day, the  
18 debtors' response is, "It is apparently the result of a vacant  
19 apartment." Again, Your Honor, a debtor that's been a debtor-  
20 in-possession in some capacity for a year.

21 And similarly, paragraph 79, under the -- I'm sorry.  
22 Let me -- yes. Paragraph 79, where the debtor responds to an  
23 allegation saying "Nine dollars was paid to an accountant to  
24 correct an error made by a bookkeeper who was later  
25 discharged." No information about who this bookkeeper is, what

1 the payment was for, so on and so forth.

2 And lastly, Your Honor, in paragraph 83 -- lastly with  
3 regard to the admissions, paragraph 83 discusses an issue that  
4 may be familiar with the Court. I believe it came up during a  
5 hearing regarding the unauthorized loan. It gives a reason; it  
6 gives an excuse. Whatever it is, it is. But it admits that  
7 there was an unauthorized loan.

8 Your Honor, the -- we would submit that based upon the  
9 allegations that we made in the motion coupled with the  
10 admissions that are made in the opposition, Your Honor has a  
11 clear picture of undisputed facts; in a sense, a stipulation of  
12 facts. And the remaining job to be done is a legal  
13 determination as to whether, under 1112(b)(4)(B), (F) and (E),  
14 cause exists to convert these cases. And we would submit to  
15 the Court that cause does exist and that the cases must be  
16 converted.

17 I'll just -- just briefly, the dismissal versus  
18 conversion conundrum, in the case of 304 Washington and, to a  
19 lesser extent, Prevention I, under different circumstances I  
20 may be advocating for dismissal. However, since these cases  
21 are -- we do have the three related cases. I think that there  
22 are, or at least may be, assets in the Fischman matter for a  
23 trustee to liquidate for the benefit of creditors. And, of  
24 course, if the trustee chose to do so, he or she could operate  
25 the business for some time. So the point of this is that I

1 think it makes sense to take the same action with each of the  
2 three cases and convert.

3 THE COURT: Well, if a trustee's appointed in the  
4 Fischman case, and Mr. Fischman is the hundred percent owner --

5 MR. CURTIN: Correct.

6 THE COURT: -- of each of these entities.

7 MR. CURTIN: So it's --

8 THE COURT: So the trustee would then become --

9 MR. CURTIN: Even absent conversion of the two --

10 THE COURT: -- person who is in control of --

11 MR. CURTIN: -- other cases, that's correct, Your  
12 Honor. So for practical purposes, it would be the same thing.  
13 So that's --

14 THE COURT: And it would be up to that -- that trustee  
15 could decide at that point whether he wanted to convert the  
16 other two cases -- or she.

17 MR. CURTIN: Right. That could -- I think there's  
18 cause in all three cases, but yes, to answer Your Honor's  
19 question.

20 THE COURT: In other words, we don't have to get into  
21 the facts of the other three cases.

22 MR. CURTIN: Right. And, Your Honor, the facts are  
23 similar because, again, it all goes back -- but yes, that's  
24 correct.

25 THE COURT: Okay. Thank you.



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1 MR. CURTIN: Subject to Your Honor's questions, that's  
2 all I have.

3 THE COURT: No. I don't have any questions at this  
4 time.

5 MR. CURTIN: Okay. Thank you, Your Honor.

6 MR. GREENWALD: Good afternoon, Your Honor. Wayne  
7 Greenwald for the debtors. Initially, Your Honor, I apologize  
8 for the timing of the filing of the response. I was not well  
9 and I had a difficulty. But I want to apologize for it  
10 nonetheless. I understand that they were read and I thank you  
11 for doing that. Thank you.

12 As far as 304 Washington and --

13 THE COURT: Let's talk about Mr. Fischman's case.

14 MR. GREENWALD: Okay. On the Fischman case, number  
15 one, these debtors are honest debtors. They've disclosed  
16 everything. They've been completely transparent about what's  
17 going on.

18 THE COURT: That's not really true, actually. That's  
19 not really true.

20 MR. GREENWALD: Where is Your Honor seeing that they  
21 were not transparent?

22 THE COURT: Well, they didn't provide the reports that  
23 they were supposed to provide on Yakaputz on the day that --  
24 when they were supposed to provide it. And they didn't provide  
25 operating reports on Carriage House at all.

1 MR. GREENWALD: Your Honor, number one, for Yakaputz,  
2 Yakaputz was provided to the receiver. The Yakaputz accounting  
3 was provided to the receiver in the beginning of October. And  
4 it states in there that we had provided it to the receiver as  
5 long as all monies are there required.

6 THE COURT: The order that was required -- the order  
7 that was entered

8 MR. GREENWALD: There's no question that it happened  
9 after the date the order required, Your Honor.

10 THE COURT: Well, it wasn't -- and it was required --  
11 let's see. Print that order out, would you, Tracy? All right.  
12 That's this order. All right. That by no later than September  
13 1, 2010, the debtors are required to deliver to an accounting  
14 to the Court, Fannie Mae and the Office of the United States  
15 Trustee for the sources and uses of all rents and security  
16 deposits that came into their possession, trust and control  
17 after the petition date. That wasn't done.

18 MR. GREENWALD: Your Honor, that wasn't done on time  
19 but it was done.

20 THE COURT: When was it done? Was that ever filed  
21 here?

22 MR. GREENWALD: I don't believe that I filed it here.  
23 However, it was provided to the receiver.

24 THE COURT: Well --

25 MR. GREENWALD: I did not receive a copy.

1 THE COURT: If it wasn't provided --

2 MR. GREENWALD: I did not --

3 THE COURT: The order requires it to be provided --

4 provide a delivery and accounting to the Court. Now that means  
5 file it on the docket. Or send it -- but you send it to Court,  
6 right? I remember what you did with Fannie Mae. But you  
7 apparently didn't provide it to the Office of the United States  
8 Trustee. And -- ever.

9 MR. GREENWALD: Okay.

10 THE COURT: So that is an order of the Court that was  
11 not complied with. And that, under Section 1112 --

12 MR. GREENWALD: Can be cause.

13 THE COURT: Is cause.

14 MR. GREENWALD: All right. Is -

15 THE COURT: Is cause.

16 MR. GREENWALD: Is defined as --

17 THE COURT: Cause includes --

18 MR. GREENWALD: Is defined as one that would make good  
19 cause.

20 THE COURT: -- failure to comply with an order of the  
21 Court. There was an order of the Court. It wasn't complied  
22 with. And it was an order that required disclosure and an  
23 accounting and it wasn't complied with. So to stand there and  
24 tell me that these debtors have disclosed everything is simply  
25 not accurate.

1 MR. GREENWALD: Well, they disclosed it but they  
2 disclosed it late.

3 THE COURT: They didn't disclose it to the Court and  
4 they didn't disclose it to the U.S. trustee.

5 MR. GREENWALD: Well, Your Honor, it is also contained  
6 in our response.

7 THE COURT: Well, if it's two months late, it's not  
8 timely.

9 MR. GREENWALD: Your Honor --

10 THE COURT: The order --

11 MR. GREENWALD: -- the fact --

12 THE COURT: An order -- a deadline in an order is not  
13 just --

14 MR. GREENWALD: I'm --

15 THE COURT: -- a guideline.

16 MR. GREENWALD: No argument with that, Your Honor.

17 THE COURT: Okay. Whether or not it's in your  
18 response or adequately covered in your response, it's sixty  
19 days late.

20 MR. GREENWALD: You're --

21 THE COURT: And that's not compliance with an order of  
22 this Court.

23 MR. GREENWALD: Your Honor, if you'll recall, I said  
24 that they had been transparent, that many of the things that  
25 the trustee was able to -- was able to say is because they gave

1 complete disclosure of all of their finances that were going  
2 on. They've been candid; they have been honest. Carriage  
3 House? Carriage House has not been in operation. And that was  
4 their mistake. But upon learning that they had to go do it for  
5 inactive entities, they prepared an MOR for the Carriage House.  
6 But they have been providing MORs at beginning. MORs and the  
7 controlled entity reports were late, unquestionably.  
8 Unquestionably. But that lateness was decreased. To the  
9 extent that September was filed on time -- we expect to file  
10 October early. And for August, it was two days late. They now  
11 have it under control.

12 THE COURT: Okay. Mr. Greenwald, 1112 is pretty clear  
13 as accurate -- was amended in 2005. It's pretty clear what  
14 constitutes cause. Failure to comply with an order of the  
15 Court constitutes cause. And when cause exists, conversion or  
16 dismissal is mandatory unless you can satisfy the requirement  
17 of 1112(b)(2).

18 MR. GREENWALD: Of excuse --

19 THE COURT: So --

20 MR. GREENWALD: -- and that's been cured. And there  
21 has been cure. We have brought forward the missing operating  
22 reports or the late operating --

23 THE COURT: So what's the excuse --

24 MR. GREENWALD: We are now current.

25 THE COURT: What's the excuse?

1 MR. GREENWALD: I can only say it was a learning  
2 curve, Your Honor.

3 THE COURT: That's the -- I reject that as an excuse.  
4 This is a person who's been in this court, involved with this  
5 process for, as Mr. Curtin points out, the better part of this  
6 year. And he's got an accountant.

7 MR. GREENWALD: Your Honor, also, one of the  
8 problems --

9 THE COURT: I don't find that to be an excuse.

10 MR. GREENWALD: Okay. Also, one of --

11 THE COURT: If you want to put Mr. Fischman on the --  
12 if you want -- I think what has happened here -- what is  
13 happening here is that a -- a case has been made by the U.S.  
14 trustee that is certainly a prima facie case. He has shown  
15 that there is cause as defined by the statute to convert or  
16 dismiss this case. So now the burden lies with the debtor to  
17 establish if the debtor chooses to try to do so, that one of  
18 the exceptions to the -- that some exception to the requirement  
19 exists.

20 MR. GREENWALD: If Your Honor would allow us to have  
21 an evidentiary hearing, that would be fine.

22 THE COURT: Call your first witness.

23 MR. GREENWALD: If I may just have five minutes with  
24 Mr. Fischman before I put him on?

25 THE COURT: No.

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1 MR. GREENWALD: Okay. Your Honor, I'll call Mr.  
2 Fischman.

3 THE WITNESS: Your Honor --

4 THE COURT: Okay. Mr. Fischman, you need to take the  
5 witness stand.

6 (Pause)

7 THE CLERK: Please raise your right hand?

8 (Witness sworn)

9 THE CLERK: Would you please state and spell your name  
10 for the Court?

11 THE WITNESS: Michael Fischman. M-I-C-H-A-E-L,  
12 F-I-S-C-H-M-A-N.

13 THE WITNESS: Okay. May I begin, Your Honor?

14 MR. GREENWALD: Mr. Fischman, I have to ask you a  
15 question.

16 THE WITNESS: Okay.

17 THE COURT: Mr. Fischman, this is a process where you  
18 respond to questions that are asked of you and you don't speak  
19 unless there's a question pending. If there's an objection,  
20 you do not speak until the objection's been ruled on.

21 THE WITNESS: Can I make the objection?

22 THE COURT: I beg your pardon?

23 THE WITNESS: May I make the objection?

24 THE COURT: No. The objection -- you are the witness.  
25 An objection will be made by other parties --

1 THE WITNESS: Okay.

2 THE COURT: -- if there are any objections to be made.  
3 You may begin your inquiry, Mr. Greenwald.

4 MR. GREENWALD: Thank you, Your Honor.

5 DIRECT EXAMINATION

6 BY MR. GREENWALD:

7 Q. Mr. Fischman, you've heard that you were late in providing  
8 the accounting to -- on Yakaputz.

9 A. Correct, yes.

10 Q. All right. Can you explain the reason why you were late?

11 A. Totally blocked it out. This has been an incredibly  
12 confusing experience for me. I, in all good faith, was not  
13 even aware that this had a timeline on it. So it was only when  
14 I was answering the motion that I became aware that I had  
15 reneged on answering this as quickly as I should have. But it  
16 was like a total confusing experience for me. It was not an  
17 intentional act. It was an act of -- just an unwitting act, a  
18 total block-out. This has been an incredibly anxiety producing  
19 experience for me. I am taking medication in order to sleep.  
20 I can't sleep. You know, this is my life's work here. And I  
21 have family at stake and I have a wife at stake. And, you  
22 know, this was just like a total loss of consciousness --

23 Q. Mr. Fischman --

24 A. -- on my part. Yeah?

25 Q. All right. Have there been any -- have there been other,



1 for lack of a better term, distractions in your family?

2 A. Well, you know, my daughter --

3 (Pause)

4 A. I have trouble talking.

5 THE WITNESS: Can I take a moment to --

6 THE COURT: Yes.

7 THE WITNESS: -- to recover?

8 THE COURT: Do you want to provide Mr. Fischman --

9 THE WITNESS: Could I go to the restroom?

10 THE COURT: -- with a glass of water?

11 MR. GREENWALD: Okay. Thank you.

12 (Pause)

13 MR. GREENWALD: Thank you for this intermission, Your  
14 Honor.

15 THE WITNESS: Thanks. Thanks. I don't know if it's  
16 going to help too much.

17 A. Talking about my daughter might be too emotional for me.  
18 So if we could deal with some other questions?

19 Q. All right. On the monthly operating reports --

20 A. Yes.

21 Q. -- that were filed late --

22 A. Yes.

23 Q. All right? Can you explain why they were filed late?

24 A. You know, we did everything in our power -- I've had two  
25 people assisting me as bookkeepers for quite a while. This is

1 not a new -- this is not a new event. The first bookkeeper was  
2 hired as soon as we filed -- as soon as we filed. We had  
3 trouble with the previous bookkeeper. She was doing everything  
4 wrong. And that's actually where that 900 dollar check went in  
5 order to make corrections of the MORs that she was submitting.  
6 So I've been working with a bookkeeper. I've been trying very  
7 hard to get these things in time. It's been an extremely  
8 tedious process because there's so many different things to  
9 record.

10 So we've tried very hard. And usually we get everything  
11 to my accountant in time but sometimes there's a delay.  
12 Actually, it comes from the final product, putting it together.

13 Q. The first operating report -- was the accountant retained  
14 yet?

15 A. I don't recall.

16 Q. All right.

17 A. I don't --

18 MR. GREENWALD: Your Honor, I think the record will  
19 reflect that Mr. Korcarz was not yet retained at that time.

20 MR. CURTIN: Objection, Your Honor. Mr. Greenwald's  
21 testifying.

22 THE COURT: Whose fault is that? It wouldn't be -- I  
23 mean, that's not -- I don't think the fact that you haven't  
24 retained your accountant is an excuse for not filing an  
25 operating report on time.

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1 MR. GREENWALD: However, Your Honor, in an effort to  
2 manage correctly, he did retain an accountant and replaced  
3 bookkeepers so things would be done on time correctly.

4 Q. And, Mr. Fischman, was the --

5 A. If I could just add to that, one of the reasons they were  
6 not done on time is 'cause I was not in the routine. You know,  
7 we went from reporting one entity to suddenly reporting ten or  
8 eleven different entities. This was like a very different  
9 procedure. It was very hard to get that -- I mean --

10 Q. Have you succeeded in getting them in on time?

11 A. Yes. They're coming in not time. We're getting the  
12 process. You know, it's a --

13 Q. The last operating report was for September. Was that in  
14 on time?

15 A. Yes, it was.

16 Q. The operating report for August --

17 A. I believe that was three days late.

18 Q. Okay. And the operating report for July?

19 A. I'm not -- I think it was about six days late or seven  
20 days late. But again, it's --

21 Q. Well, but for --

22 A. -- getting into the swing of it. It's --

23 Q. Right. The operating report for --

24 A. It's like a business. It's like a --

25 Q. The operating report for October, when do you anticipate

1 that being filed?

2 A. We could probably have that filed the latest by the 15th.

3 Q. So you expect to be able to file that before the deadline?

4 A. Yes. We have a new procedure. What we do is we tally up  
5 every week. What we were doing before is we were waiting till  
6 the end of the month for a tally. So now what we do is we do  
7 it every week so at the end of the month it's all there. And  
8 we just have to wait for the bank statements.

9 Q. Okay. There was discretion --

10 MR. GREENWALD: Excuse me, Your Honor. It looked like  
11 Your Honor was about to ask a question.

12 THE COURT: No.

13 Q. In the response, there's discussion about payments that  
14 were made to either Albany Commons by tenants or to Yakaputz by  
15 tenants.

16 A. Yes.

17 Q. Can you describe what was done to those and why that  
18 happened?

19 A. Well, we have a credit card vending machine and some of  
20 the tenants pay through the credit card. So that card is -- we  
21 only have that through Albany Commons. So some of the rents go  
22 directly to Albany Commons. Some of the people in Albany,  
23 because the billing is on Albany Commons' stationery,  
24 automatically make their checks to Albany Commons even though  
25 it says on the invoice make it out to 572 or whatever the

1 entity is, they still automatically make it out. So when we  
2 get the checks, we put it into Albany Commons.

3 Q. Right.

4 A. And then the money is paid back to the entity unless, as  
5 it is, there's been substantial construction that's been going  
6 on on Prevention I's property. And the funds for that have  
7 been left in Albany Commons to disburse all the payments of  
8 Home Depo and salaries and so, mainly for construction costs.

9 Q. For the billing practices, have you changed the way  
10 tenants receive bills?

11 A. Yes.

12 Q. Can you describe how it works now?

13 A. Well, the tenants in the Brooklyn properties receive an  
14 invoice that basically has my name on it and make checks out to  
15 Michael Fischman. When we were billing for Yakaputz before the  
16 receiver was in, we were billing under Yakaputz stationery.  
17 And now that we found out that Carriage House Development is  
18 still alive -- I didn't realize the corporation was still  
19 alive. That's why we didn't file reports for it. We're using  
20 that stationery again for billing in Brooklyn. So we're using  
21 that as a management company again. We were originally billing  
22 everybody through Carriage House Development. All the billing  
23 to all the buildings in Albany and New York that was just being  
24 used as a billing company, that has stopped. Now it's being  
25 billed separately through Albany Commons for the Albany

1 properties and through either Fischman directly or through  
2 Carriage House now that they've been reinstated for billing.  
3 So --

4 Q. There was reference made to - I mean where you acknowledge  
5 that there was a payment for -- there's Club Penguin and also  
6 for theater tickets which had not been reimbursed.

7 A. That's correct.

8 Q. Is it your intention to reimburse?

9 A. Yes.

10 MR. CURTIN: Objection, Your Honor. If I may -- and I  
11 apologize in advance for the speaking objection. But my  
12 understanding was that the Court had pointed out that we had  
13 proven our case regarding 1112(b)(4)(E) and that now the burden  
14 had shifted to the debtor to show that the case should not be  
15 converted or dismissed under (b)(2). And now we're moving on  
16 to the gross mismanagement grounds which I don't believe, at  
17 this point, are relevant. If there's cause under subsection  
18 1112(b)(4)(E) then really the only issue is whether the debtor  
19 can satisfy its burden under 1112(b)(2) which these questions  
20 have nothing to do with.

21 THE COURT: I'm going to permit Mr. Greenwald to allow  
22 his testimony -- to introduce testimony about all of the  
23 grounds for conversion or dismissal that were put on the record  
24 when you -- during your presentation.

25 MR. CURTIN: Thank you, Your Honor.

1 THE COURT: Go ahead.

2 MR. GREENWALD: Thank you very much, Your Honor.

3 THE COURT: Go ahead, please.

4 Q. If you would answer the question?

5 A. I'm sorry. Could you reframe it?

6 Q. The question was the amount for the theater tickets and  
7 for Club Penguin, is it your intention to pay that back?

8 A. Yes.

9 Q. And when do you intend to pay that back?

10 A. I'll pay it back at any point. But it was -- basically,  
11 the Penguin was for my daughter, something for the computer.  
12 And actually, the tickets were for a birthday. We went to the  
13 theater.

14 Q. Okay. But do you intend --

15 A. I used Albany Commons 'cause we don't have a credit card.

16 Q. All right. Now do you account for all of the expenses for  
17 which the debit card is used?

18 A. Yes, absolutely

19 Q. All right.

20 A. I account for them.

21 Q. And do you pay them back?

22 A. Yes. Yes, we do.

23 Q. And do the entities pay them back?

24 A. Yes.

25 Q. And they're recorded?

1 A. Everything is recorded.

2 Q. And are there -- is it possible to tell what entity has  
3 used the credit card and paid it back?

4 A. Yes. Yes, it is possible.

5 Q. And why is it that Albany Commons had a debit card?

6 A. Because it's not a DIP account which, as the Court knows,  
7 with a DIP account you can't get a debit card. So Albany  
8 Commons is not a DIP account.

9 Q. Do you have a credit card?

10 A. I have a debit card.

11 Q. Right. But do you individually have a credit card?

12 A. No.

13 Q. So would you be able to make any purchases for which a  
14 debit or a credit card or other form of plastic device would be  
15 used?

16 A. No.

17 Q. All right. Have you ever tried to make purchases for  
18 yourself using a check?

19 A. That can be done if you're paying a bill but not if you're  
20 buying construction supplies or theater tickets, for example,  
21 or chalking a child's --

22 Q. And the debit card is used for construction supplies?

23 A. Primarily.

24 Q. All right. And for what other purposes is it used?

25 A. Paying -- it's been used for fuel costs. Sometimes the



1 charge for fuel -- everything's related to the real estate.

2 Q. Okay. To --

3 A. Occasionally -- I have occasionally used it for personal  
4 charges but then we pay it back.

5 Q. Okay.

6 A. Then we pay it -- it's when there's no cash available. I  
7 have no option --

8 Q. Do you anticipate that there will ever be another occasion  
9 where the electricity bill will not be paid on your home?

10 A. No.

11 Q. And what have you done to make sure that that doesn't  
12 arise?

13 A. Well, we're staying current with our electric bill.

14 Q. So you're current on --

15 A. Yes.

16 Q. -- electricity bills? What would have happened if you  
17 didn't do what you did with, for lack of a better term,  
18 borrowing the money from Yakaputz?

19 A. Well, our office would have shut down because the  
20 administrative offices is adjoined to my home in Westchester.  
21 I would not have been able to see patients there. I see  
22 patients there also. My kids would have come home from school  
23 and they would have had no electricity.

24 Q. All right. But in any event --

25 A. We had no other avenue for getting money to get the

1 electric back on within a reasonable period of time.

2 Q. So you've taken steps so this will never happen again?

3 A. Yes.

4 Q. Tranquility Spa. Could you describe how that came about?

5 A. Well, I hurt myself.

6 Q. What did you do?

7 A. I was lifting some stuff over at 508 and I hurt my  
8 shoulder. And, I mean, I must admit, I don't have a great  
9 shoulder to begin with. But this is -- I went for a medical  
10 massage --

11 Q. Okay.

12 A. -- and I charged it as a business expense --

13 Q. Okay.

14 A. -- against Albany Commons.

15 Q. Because that happened --

16 A. That happened --

17 Q. -- in connection with the work that was being done.

18 A. -- on construction site, yeah. Despite the fact that I  
19 had a bad shoulder to begin with but it got irritated from  
20 that. So I used it as a business expense.

21 Q. Okay. What have you been able to do in connection with  
22 the reorganization process?

23 A. Well -- thanks. I appreciate it. Well, you mean, in  
24 terms of depending --

25 Q. Do you have any possibility of selling of assets?

1 A. Yes. Yes. We have a contract for sale for one of the  
2 properties in Albany. We have a signed contract for sale of  
3 the Brooklyn property, 886. We have a low offer on 154.

4 THE COURT: You have a what?

5 THE WITNESS: A low offer. The offer is very low.  
6 We've countered with a --

7 Q. There's a bid for 154?

8 A. Specifically, it was a two million offer and we're  
9 countering -- it's being offered at 2.9. So that was low and  
10 we countered with 2.75. So that's pending. We also have a  
11 partnership in an ongoing -- for Yakaputz --

12 Q. For Yakaputz?

13 A. -- where fifty percent of the shares of Yakaputz are being  
14 sold.

15 Q. Could you describe that?

16 A. It's a 260 something thousand dollar buy-in for fifty  
17 percent of Yakaputz. Those monies would be used to satisfy the  
18 arrears to Fannie Mae and reinstate the existing mortgage. And  
19 we would then operate with that mortgage with the fifty percent  
20 partnership in the corporation that owns it.

21 Q. Is there a term sheet for that?

22 A. Yes.

23 Q. All right. And what do you see as the next step? What do  
24 you see as the next step in that process?

25 A. Well, to get approval by the Court. And once the Court

1 approves that, we'll approach Fannie Mae. And hopefully,  
2 that'll be an easy transition and we'll be able to reinstate  
3 Yakaputz without a Chapter 11.

4 Q. Okay. With respect to Prevention I, is there a proposed  
5 sale on that property?

6 A. There's a proposed -- there's a contract for 695,000.

7 Q. And -- but you were still waiting for the paper on that.  
8 But there is a contract out there being circulated, is that  
9 right?

10 A. Yes. You're in touch -- you're in contact with the  
11 attorney.

12 MR. GREENWALD: Your Honor, I can represent that I was  
13 in contact with the broker and I have contacted the buyer's  
14 counsel but I am waiting to hear back from them. I have been  
15 sent a copy of the proposed contract.

16 Q. On 304, can you describe your efforts to reorganize there?

17 A. Yes. What we're hoping to do is reinstate the mortgage,  
18 the first mortgage, through Haven Capital. We're in a position  
19 to pay the arrears on that. However, we have not gotten  
20 cooperation from --

21 Q. What have we been waiting for?

22 A. We're waiting for the amount that's owed.

23 Q. Have we asked for it?

24 A. We've been asking for it for about a month and a half or  
25 longer, I think.

1 Q. Okay. Do you have the -- how do you intend to reinstate  
2 that mortgage?

3 A. We would have the cash. My wife has a very good friend  
4 that will put up the cash and become a part owner of the  
5 property or give us the mortgage on the property.

6 Q. Could you describe the pending deal with 886?

7 A. 886, we have a signed contract to do a short sale.

8 Q. Are the buyers taking any action to pursue that?

9 A. They're currently negotiating with the bank.

10 Q. Okay.

11 MR. GREENWALD: And, Your Honor, I would represent  
12 that we would be making a motion for authority to sell upon  
13 hearing from the buyers that they have achieved an accord with  
14 the bank. Until then, it may be premature to make that motion  
15 but we make it nonetheless.

16 THE COURT: Well, if the bank won't accept less than  
17 it's owed then it's pointless.

18 MR. GREENWALD: Except that -- except that the bank  
19 after seeing the motion to approve the sale may decide that it  
20 will buy it in and therefore own it as opposed -- or it may  
21 decide that, you know what, I'll take the money. However, at  
22 this point, the bank has not been active with respect to that  
23 property. So this way, we're taking action so that something  
24 can be done with that property.

25 THE WITNESS: May I say something?

1 MR. GREENWALD: Yes.

2 THE WITNESS: I would just like to say something to  
3 the Court that --

4 MR. CURTIN: Objection, Your Honor.

5 THE COURT: Okay. Mr. Fischman, your role is to --

6 THE WITNESS: Answer questions.

7 THE COURT: -- respond to questions that are put to  
8 you.

9 THE WITNESS: Okay.

10 BY MR. GREENWALD:

11 Q. Mr. Fischman, are you responding to or are you adding to a  
12 question that I previously asked you?

13 A. I'm adding to all the questions --

14 MR. CURTIN: Objection, Your Honor.

15 THE COURT: Sustained.

16 MR. GREENWALD: I was just going to ask which  
17 question.

18 THE WITNESS: Okay.

19 Q. There's been work in improving the building, is that  
20 correct?

21 A. That is correct. The 508 -- we are currently completing a  
22 fifth apartment which will increase the cash flow approximately  
23 1250 a month. Puts the building at a substantially cash  
24 positive -- positive cash flow.

25 Q. How much time do you think you need to be able to finalize

1 these agreements that you've described?

2 A. I would like sixty days to revisit it. Hopefully be  
3 completed in sixty days so I could revisit it at that point.  
4 Hopefully, it'll be accomplished by then.

5 Q. Within that sixty day period, do you anticipate being able  
6 to make a motion to the Court for approval of these  
7 transactions?

8 A. Yes, I do.

9 (Pause)

10 Q. The one thousand dollars that you used for an appraiser,  
11 why did you do that?

12 A. I did it because I thought that's what we were doing. We  
13 were -- Haven had made a comment that the property that's owned  
14 by 304 Washington was valued at approximately what they say we  
15 owe them. We were talking, you and I, counsel and I, that we  
16 should do an appraisal on the property to show them what the  
17 actual value was. I was not aware that I needed to get  
18 authorization from the Court.

19 Q. And what happened when you found out that -- or what  
20 happened when I found out that you did an appraisal?

21 A. I don't think I should use those words here but you got  
22 pretty pissed off.

23 Q. Did I --

24 A. What?

25 Q. Did I know you were getting an appraisal?

1 A. No. No. I thought you did but apparently, after it was  
2 done, you said, well, you know, that had to get approved first.  
3 Again, I am not a professional at doing this. I --

4 Q. And when I --

5 A. So --

6 Q. When I found out, did I tell you that you cannot hire any  
7 professionals without court order?

8 A. Yes, you did.

9 Q. Do you expect to be hiring anybody other than maybe  
10 construction workers which, in the ordinary course of  
11 business -- do you anticipate hiring anybody except for maybe  
12 construction workers to do the work on the premises in the  
13 ordinary course without a court order?

14 A. No. No, not aside from construction workers. We are  
15 trying to get the approval of a mortgage banker to negotiate.  
16 We still haven't gotten that approval.

17 Q. You've heard Mr. Curtin refer to various payments that  
18 came out of Albany Commons or Yakaputz --

19 A. I'm sorry.

20 Q. Thank you. You've heard Mr. Curtin refer to various  
21 payments that he considered commingling with respect to Albany  
22 Commons or Yakaputz and the various entities.

23 A. Yes.

24 Q. Can you describe what those payments were for and how the  
25 accounting was done for them?



1 A. I'm sorry. I can't unless we're specific --

2 Q. Okay.

3 A. -- to --

4 Q. Albany Commons --

5 A. Yes.

6 Q. -- made payments on account of construction work, correct?

7 A. Yes.

8 Q. All right. Was it paid for that work?

9 A. Yes.

10 Q. The work was done for who?

11 A. Well, at one period of time, there was work done on 304.

12 We renovated an apartment there, apartment number 5. I  
13 provided pictures for the Court.

14 Q. Pictures are included within the opposition, is that  
15 correct?

16 A. Yes. Yes. And we also -- there were times when we used  
17 Albany Commons to pay for construction supplies for Yakaputz  
18 for Apartment number 7 because we couldn't charge it any other  
19 way. So that was actually before I had -- I think it was  
20 before I had -- I'm not sure if that was before I had a debit  
21 card -- the Yakaputz. Yakaputz only recently got those debit  
22 cards. So --

23 Q. Were payments --

24 A. Yeah. It was paid back.

25 Q. It was paid back. For the other properties other than --

1 A. Well, 508, it's been quite a big expense because --

2 Q. Well, 508 is Prevention I, correct?

3 A. -- they over-budget -- what?

4 Q. 501 (sic) is Prevention I?

5 A. 508.

6 Q. 508 is Prevention I, is that right?

7 A. Yeah. Yeah. I mean, we're just about finishing up now.

8 I'm actually going to be up there tomorrow to meet with the

9 purchaser because he wants to go over some stuff with me. But

10 we're finishing that one up now. That one went pretty over-

11 budget. But I charged through Albany Commons. No other way to

12 pay for Home Depo.

13 Q. Is there a way for you to, in the future, avoid using --

14 you individually, to avoid using the debit card, Albany

15 Commons' debit card?

16 A. You mean, for personal expenses?

17 Q. For personal expenses.

18 A. Only if I use cash. And sometimes when we run out of

19 cash, we use a credit card -- a debit card. So -- I mean, once

20 we're out of the bankruptcy.

21 Q. When you use -- do you ever make purchases with cash?

22 A. Yes.

23 Q. Do you account for them in your operating reports?

24 A. Yeah. Yeah. I always get receipts. But primarily, like

25 when we go to the supermarket, I have to use cash. It's often

1 for personal expenses as I can because I don't want it to keep  
2 being a problem on the MORs. So we do use cash. But we bring  
3 the receipts back and those were accounted for at the end of  
4 the month.

5 Pause

6 Q. There was not provided rent-rolls in certain operating  
7 reports. Do you now provide rent-rolls in your operating  
8 reports?

9 A. We do.

10 Q. Do you anticipate continuing to provide rent-rolls in your  
11 operating reports?

12 A. Of course I do. Absolutely.

13 Q. To the extent that there were deficiencies that are  
14 referred in the motion -- you read the motion, correct?

15 A. Yes.

16 Q. The deficiencies that are referred to in the motion, what  
17 have you done to address them?

18 A. Which deficiencies are you referring to?

19 Q. In terms of operating reports.

20 A. I'm still not clear on the question.

21 Q. Okay. All right. Where something would be missing.

22 We've already discussed the rent-roll. If there's a  
23 discrepancy, will you footnote or have Mr. Korcarz footnote the  
24 discrepancy and the reason therefor.

25 MR. CURTIN: Objection, Your Honor. It's more of a

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1 leading question than the other leading questions have been.

2 He just answered his own question from the last question.

3 MR. GREENWALD: Okay. Sorry, Your Honor.

4 THE WITNESS: Sorry. I don't understand the question.

5 I didn't understand the question.

6 Q. If there are discrepancies --

7 A. When you say discrepancies, could you give me an example?

8 Q. Let's say if the rent-roll is --

9 A. Oh. In other words, if --

10 Q. -- one amount and the rents are another amount --

11 A. Right. We --

12 Q. -- what will you do?

13 A. As to that, absolutely. We account for that. We would  
14 account for it. Usually, that's when rent is paid to Albany  
15 Commons and not directly to the entity. We then are in a  
16 position to pay back that entity which we do, if that's what  
17 you mean by discrepancy. Okay.

18 Q. Thank you. Can you tell me the role of Mr. Korcarz in the  
19 reorganization process?

20 A. In reorganization process? Well, I could tell you what  
21 his role is in terms of --

22 Q. In this case.

23 A. -- our preparing the MORs --

24 Q. Okay, if you would.

25 A. That he's extremely active and absolutely fantastic in his

1 perseverance of staying with this and making sure everything's  
2 done exactly the way it should be done. We -- he works  
3 directly with the bookkeepers in my office when they have any  
4 questions as does your legal assistant. She works with us as  
5 well when we have any questions. You know, we're trying to  
6 fine tune this. So Hal is incredible with that. I mean, he's  
7 put in a lot of time and energy to make sure those reports are  
8 in on time. Sometimes I get a ride there early in the morning  
9 on Sunday and get them to make sure they're typed in time to  
10 get in so that the Court gets them.

11 Q. Did you ever ask permission to have a meeting with the  
12 Office of the United States Trustee?

13 A. I did.

14 Q. And what was the purpose of that meeting?

15 A. The purpose of that meeting was so we would have a very  
16 clear idea of what the trustees were looking for with the MORs  
17 to make sure that we give it to you exactly the way you want  
18 it. That was primarily -- really, make sure we give you  
19 exactly what you want.

20 Q. And were you granted that meeting?

21 A. No, I was not.

22 MR. GREENWALD: Your Honor, I have no further  
23 questions.

24 CROSS-EXAMINATION

25 BY MR. CURTIN:

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1 Q. Mr. Fischman, you are Michael Fischman, the principal of  
2 the individual case here, is that correct?

3 A. That is correct.

4 Q. You're also the principal of Prevention I and the  
5 principal of 304 Washington Avenue?

6 A. That is also correct.

7 Q. And Prevention I was filed on October 15th of 2009  
8 approximately?

9 A. The --

10 Q. The bankruptcy case of Prevention I?

11 A. -- petition?

12 Q. -- was filed in October of 2009?

13 A. You talking about the petition?

14 Q. Yes.

15 A. Yes, as far as I know.

16 Q. And the petition in 304 Washington was filed in December  
17 of 2009?

18 A. To the best of my knowledge.

19 Q. And your individual case was filed in May of 2010.

20 A. That is for sure.

21 Q. And at all times between October of 2009 and now, you've  
22 been involved in all three -- in all three of these bankruptcy  
23 cases as long as they've existed, correct?

24 A. I'm sorry. I didn't hear your question.

25 Q. Have you been involved in bankruptcy cases before this

1 Court since October of 2009 personally?

2 A. No, I have not, not personal bankruptcy.

3 Q. You haven't? I used the -- have you been involved either  
4 in your personal capacity or in your capacity as a principal of  
5 a corporate debtor, have you been involved in bankruptcy cases  
6 since October 2009?

7 A. Since?

8 Q. Since October 2009, yes, sir.

9 A. I don't believe so.

10 Q. You were not --

11 A. I'm not sure -- I'm not sure I understand --

12 Q. Were you the principal of Prevention I in October 2009  
13 when it filed for bankruptcy?

14 A. Again, I'm having a little trouble hearing. I'm sorry.

15 Q. Were you the principal of Prevention I, one of the debtors  
16 that we're talking about --

17 A. Yes.

18 Q. -- in October of 2009?

19 A. Yes.

20 Q. And are you the principal of Prevention I now?

21 A. Yes, I am.

22 Q. Were you the principal of 304 Washington in December of  
23 2009?

24 A. Yes.

25 Q. Are you the principal of 304 Washington now?

1 A. Yes, I am.

2 Q. I want to talk about the orders of the Court that we've  
3 been discussing. You testified that you didn't realize that  
4 Carriage House had to file a controlled entity report, is that  
5 correct?

6 A. That's correct.

7 Q. Did you read the Court's July 2nd order that required  
8 specifically that a report be filed for Carriage House?

9 A. One more time. I'm --

10 Q. Did you read the Court's order dated July 2nd that  
11 required a controlled entity report for Carriage House?

12 A. If I did, you know, it just went completely --

13 MR. CURTIN: For the record, Mr. Fischman has taken  
14 his hand and put it over his head.

15 A. Meaning, it went over my head. Quite honestly, Mr.  
16 Curtin, many of these legal documents are very new to me.

17 Q. I didn't hear you.

18 A. Are very new to me in terms of reading them and studying  
19 them and so forth. So I have been accustomed to relying on  
20 counsel to take care of things for me. I'm learning a whole  
21 different way of doing things since I'm working with my current  
22 attorney.

23 Q. You testified on direct that you recently became aware  
24 that Carriage House was still in existence, is that correct?

25 MR. GREENWALD: Objection. Mischaracterizes his



1 testimony.

2 MR. CURTIN: Actually, that's exactly what he said.

3 MR. GREENWALD: He said -- he said the existence not  
4 in business.

5 THE COURT: I think that's what Mr. Curtin just said.

6 MR. GREENWALD: But he said exist -- forgive me. Then  
7 I misheard. Your Honor, objection withdrawn. I'm sorry.

8 Q. So that was, yes, that is what you testified to?

9 A. Please ask me the question again.

10 Q. On direct examination, did you testify that you just  
11 recently became aware that Carriage House was in existence.

12 A. I became aware that the corporation was still active.

13 Q. Okay. You appeared before the Office of the United States  
14 Trustee and me specifically at a 341 meeting of creditors,  
15 isn't that accurate?

16 A. I did.

17 Q. Okay. And didn't we talk about Carriage House at that  
18 point?

19 A. We did.

20 Q. And didn't you tell me that it was an active corporation  
21 at that point?

22 A. No. I said that we were using it for billing purposes but  
23 I was not aware that it was still active. It's a Connecticut-  
24 based corporation.

25 Q. Okay. And when we discussed reporting requirements,

1 didn't I tell you that all of your entities would be required  
2 to file those reports?

3 A. You did.

4 Q. Thank you.

5 A. You absolutely did. And that went completely over my  
6 head.

7 Q. Let's talk about -- you mentioned -- I have a couple of  
8 specific questions regarding the appraiser that's been  
9 discussed. At a certain point in time, did you hire an  
10 appraiser?

11 A. Yes, I did.

12 Q. And did you pay that appraiser?

13 A. Yes, I did.

14 Q. Did you seek Court approval to hire that appraiser?

15 A. I did not.

16 Q. Did you seek Court approval to pay that appraiser?

17 A. I did not.

18 Q. On direct, you testified that you used the Albany Commons  
19 debit card for the Yakaputz construction expenses, is that  
20 correct?

21 A. That's correct.

22 Q. You also testified that the reason that you were using a  
23 debit card was because you couldn't get a debit card for the  
24 debtor-in-possession account, is that correct?

25 A. It's not that I couldn't get it. I don't believe I had it

1 yet.

2 Q. Okay.

3 A. I don't believe I had had it yet.

4 Q. Is Yakaputz a debtor?

5 A. No. Uhh --

6 Q. Isn't it correct that Yakaputz is not a debtor?

7 MR. GREENWALD: Your Honor, we'll concede it's not a  
8 debtor.

9 Q. So if --

10 THE WITNESS: I don't know the answer to that.

11 Q. Let me --

12 MR. CURTIN: I'll withdraw the question.

13 Q. Has Yakaputz filed a bankruptcy petition?

14 A. No.

15 Q. So couldn't Yakaputz have obtained a debit card if it  
16 wished?

17 A. Yes. Yes. And it did.

18 Q. Okay. But again, your testimony was that you paid for  
19 expenses for Yakaputz out of Albany Commons.

20 A. When there was no debit card for Yakaputz at that point.

21 Q. Let's talk about your progress in the case so far. And  
22 I'll limit myself to your individual case. Have you proposed a  
23 plan that can be confirmed in your individual case?

24 A. Yes.

25 Q. You have fi -- have you filed a plan before this Court, a

1 plan of reorganization?

2 A. We initially filed a plan of reorganization.

3 Q. Okay. Have you sought a hearing on confirmation of a  
4 plan?

5 A. I'm sorry?

6 Q. Have you sought a hearing on confirmation of a plan?

7 A. Not to the best of my knowledge.

8 Q. Have you -- there was a fair amount of discussion of sale  
9 of properties. Have you filed any motions to sell any  
10 properties in either -- any of these three cases?

11 A. Not as of yet. I don't believe we have, have we?

12 Q. Thank you. When you received notice of the motions that  
13 were filed against you by our office in these cases, you didn't  
14 file any motions to sell anything then, is that correct?

15 A. That's correct.

16 Q. Now, with regard to Prevention I and 304 -- let me start  
17 with 304 Washington. Isn't it a fact that Haven Capital has a  
18 foreclosure sale scheduled for early December for the property,  
19 the 304 Washington property?

20 A. I'm not aware of that. I haven't heard anything of that.

21 Q. And isn't it a fact that the stay has been lifted as  
22 against 304 Washington and they're free to proceed with that  
23 foreclosure if they wish?

24 A. As far as I know, the stay was only lifted on my receiving  
25 rents. I was not aware that the stay was lifted for them to

1 proceed with foreclosure.

2 Q. Now, when your counsel asked you if there was any way that  
3 you could not use a debit card, you stated no, is that correct?

4 (Pause)

5 A. I don't believe I said no. I said it's difficult to --  
6 there are times when it's very difficult to --

7 THE COURT: I cannot hear what you're saying.

8 A. I believe what I said a few moments ago was that it would  
9 be very difficult not to use a debit card since we don't have  
10 any debit cards that are attached to our personal account.  
11 Thank you. Sorry about that.

12 MR. CURTIN: Just one moment, Your Honor.

13 (Pause)

14 Q. Lastly, Mr. Fischman, going back to the personal expenses  
15 that were paid out of Albany Commons and I'm only going to  
16 focus on two, the theater tickets and the Club Penguin expense.  
17 You did not pay those back immediately after they were  
18 incurred, is that correct?

19 A. That's correct.

20 Q. You did not pay them back after you received my motion  
21 approximately a month ago, isn't that correct?

22 A. That is also correct.

23 Q. And, in fact, you haven't paid them back even as we sit  
24 here today, is that correct?

25 A. That's also correct.

1 MR. CURTIN: Thank you, Your Honor.

2 THE COURT: Okay. Is there anything else you want to  
3 put on the record, Mr. -- you want to ask him any other  
4 questions, Mr. Greenwald?

5 THE COURT: Yes, Your Honor, just a few questions.

6 THE WITNESS: May I revisit that last question, Mr.  
7 Curtin? Can I revisit that last question? If those two items  
8 were paid back? I --

9 MR. CURTIN: No. I don't actually believe you can  
10 unless the Court grants you leave to do so. I've completed my  
11 questions.

12 THE COURT: I'll allow you to complete your answer to  
13 that question.

14 THE WITNESS: May I?

15 THE COURT: Go ahead.

16 MR. GREENWALD: The Court says you may.

17 THE WITNESS: I must -- I have to admit to the Court,  
18 I have a little bit of an ADD. It is quite possible we have  
19 paid that back. I would have to look and see but it is  
20 possible we did pay that back.

21 THE COURT: But you're not telling me that you have  
22 paid it back?

23 THE WITNESS: Right. I would have to look it up to  
24 see if we paid it back. It was a thirty dollar charge and 179  
25 dollar charge total.

1 REDIRECT EXAMINATION

2 BY MR. GREENWALD:

3 Q. Mr. Fischman, you indicated that the order directing the  
4 filing of the belated entity reports and the accounting went  
5 over your head, is that what you -- that's what you said,  
6 right?

7 A. Yes.

8 Q. Have you since realized the importance of paying attention  
9 to orders?

10 A. Have I since realized --

11 Q. Have you realized the importance of paying attention to  
12 orders?

13 A. To orders?

14 Q. To orders. Written orders --

15 A. Absolutely.

16 Q. -- of the Court.

17 A. Absolutely, yes. Court orders --

18 Q. Right.

19 A. Yes.

20 Q. When you receive a written order of the Court, what do you  
21 intend to do?

22 A. Read it very carefully and make sure I understand it and  
23 take care of it. I have to satisfy it.

24 Q. If you don't understand it, what will you do?

25 A. I will contact you. I'm going to ask you anyway. But

1 would need to ask you.

2 Q. And assuming that I give you at least what will be my  
3 understanding of the order, what will you do as a result of  
4 that?

5 A. I will comply.

6 Q. Thank you. Carriage House. When Mr. Curtin asked you  
7 about the 341 meeting and your statement about Carriage House,  
8 am I correct in understanding that you said that you did not  
9 believe it was active. Is that what your statement was?

10 A. That's correct. I didn't believe it was an active  
11 corporation.

12 Q. So what would that mean to you?

13 A. I was not aware I had to do any kind of filing for it,  
14 reporting for it. It was just being used as a --

15 Q. What is your understanding of "active" as opposed to  
16 "inactive" corporation?

17 A. Well, something that's doing something, an entity that's  
18 doing something, where there's -- receiving cash.

19 Q. Does it mean that it's in existence?

20 A. -- and making disbursements. That's --

21 Q. Does it mean that the corporation is in existence or does  
22 it mean that it's doing something?

23 MR. CURTIN: Objection, Your Honor. Asked and  
24 answered and leading.

25 MR. GREENWALD: Okay.



1 Q. Okay. Mr. Curtin asked you about the sales that you were  
2 describing.

3 A. Yeah.

4 Q. When did these sales come about? When did these  
5 agreements that were described come about?

6 A. I would say within the last five weeks, four or five  
7 weeks.

8 Q. The term sheet for Yakaputz, when was that done?

9 A. Oh. We did that last week.

10 Q. Okay. The Prevention I agreement --

11 A. This was about four weeks ago.

12 Q. 866. When did you receive a copy of the proposed  
13 contract?

14 A. Where we both signed it? About two days ago, three days  
15 ago.

16 Q. So these are all very recent --

17 A. Yeah.

18 Q. -- is that right?

19 MR. GREENWALD: Thank you, Your Honor.

20 THE COURT: Anything else, Mr. Curtin?

21 MR. CURTIN: No, Your Honor.

22 THE COURT: Okay. You're excused, Mr. Fischman.

23 (Pause)

24 THE COURT: Okay. Do you have anything you want to  
25 add to the Court, any argument you want to make?

1 MR. CURTIN: Briefly, Your Honor. I'm not going to  
2 address the cause. I think I sufficiently addressed that in my  
3 initial argument. I will address 1112(b)(2). There's two  
4 requirements. One, the debtor must show that there's a  
5 reasonable likelihood that a plan will be confirmed. And, two,  
6 when the grounds for granting such relief include an act or  
7 omission, which in this case they do, that there was both a  
8 reasonable justification for that act or omission and that said  
9 act or omission will be cured within a reasonable period of  
10 time fixed by the Court.

11 Your Honor, as Mr. Fischman just testified to, there's  
12 no plan. There's no confirmation pending. There's no  
13 disclosure statement. And most notably, there's no motions to  
14 sell in spite of the fact that these cases have been pending  
15 since October and, with regard to the individual case, since  
16 May.

17 With regard to the second prong, the justification  
18 that has been submitted specifically for the cause of action,  
19 the 1112(b)(4)(E) cause of action, is that the orders "went  
20 over" Mr. Fischman's head. I would submit that that is not, by  
21 any stretch of the imagination, a reasonable justification.  
22 And for that reason, the -- we've established cause. The  
23 debtor's not been able to establish, under 1112(b)(2) that the  
24 case should not be converted or dismissed. Therefore, I would  
25 ask the Court to convert the case.

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1 MR. GREENWALD: Thank you, Your Honor. We've been  
2 hearing as gross mismanagement to some degree is bookkeeping  
3 which as been described, and which is clear -- basically,  
4 transactions have been described. And the debtor has been able  
5 to account for what has gone on.

6 The things where -- or what we have been seeing as  
7 items that have not been paid for -- we have a thirty-three  
8 payment at Club Penguin --

9 THE COURT: Why are you taking -- why are individual  
10 expenses being paid through the corporate entity account?

11 MR. GREENWALD: Your Honor, as Mr. Fischman testified,  
12 a card was not available to do it.

13 THE COURT: Why is that?

14 MR. GREENWALD: And as he also testified --

15 THE COURT: Why is that?

16 MR. GREENWALD: Why was a debit card not available?

17 THE COURT: Right.

18 MR. GREENWALD: Because, as he testified, he could not  
19 get one as a debtor-in-possession. He could not have a debit  
20 card in connection with a debtor-in-possession account. That  
21 was his testimony.

22 THE COURT: Go ahead.

23 MR. GREENWALD: So we're talking about two  
24 transactions which had not been repaid. Otherwise, the  
25 transactions which were described, there have been appropriate

1 charges made back and forth or contribution or payments made  
2 between the entities using the debit card.

3 THE COURT: Okay.

4 MR. GREENWALD: So that we are looking at gross  
5 mismanagement is amount to two, nonpayment of the thirty-three  
6 dollar charge and a 175 dollar charge which the debtor  
7 testified he will pay and also he said he might -- might even  
8 have paid. So that does not qualify as -- I don't believe that  
9 would qualify as gross mismanagement.

10 Number two. Yes, Your Honor. The orders were not  
11 complied with on a timely basis but they were complied with  
12 ultimately. And Mr. Fischman gave the reason that he really  
13 did not understand and appreciate. But he's also testified  
14 that he will pay attention as far as what has gone on and what  
15 has to be done.

16 THE COURT: All right. Mr. Greenwald, tell me what  
17 basis I would have to conclude that there is a reasonable  
18 likelihood that a plan will be confirmed within a reasonable  
19 time?

20 MR. GREENWALD: Very good, Your Honor. Mr. Fischman  
21 has been working on getting the properties to be sold.

22 THE COURT: Okay. Well, let's talk. Let's be  
23 specific here. We have -- this is a case where there is --  
24 print me the whole schedule, Tracy, please. There's 11,000  
25 dollars -- or 10,000 dollars -- 11,000 dollars in secured debt

1 and 214,000 dollars in unsecured debt. Okay. You've got the  
2 Hicks -- I think, if I'm not mistaken, that all of the  
3 properties are on Mr. Fischman's individual Schedule A, even  
4 the ones that are owned by --

5 MR. GREENWALD: Even the ones that are owned by the  
6 entities.

7 THE COURT: -- the corporate entities.

8 MR. GREENWALD: Yes.

9 THE COURT: So that's a complete -- so you've got the  
10 Hicks Street property. That's not been -- and that is -- your  
11 efforts to sell that have been unsuccessful, correct?

12 MR. FISCHMAN: Yes, Your Honor.

13 THE COURT: Okay. I'm asking Mr. Greenwald now --

14 MR. GREENWALD: Yes, Your Honor. I was about to turn  
15 to the debtor -- yes. That's been unsuccessful.

16 THE COURT: Okay. So you've got a property that --  
17 and is that -- that property, is that -- tell me the status of  
18 that property. It's in default, correct?

19 MR. FISCHMAN: No.

20 THE COURT: Mortgage is in default?

21 MR. GREENWALD: That is not in default. He's actually  
22 current in payments on that, Your Honor.

23 THE COURT: Okay. So that property is not in default.

24 MR. GREENWALD: And I believe it's also self-  
25 sustaining. Also, Your Honor --

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1 THE COURT: Okay. It's self-sustaining. But why  
2 haven't you been able to sell it? I mean, it's -- according to  
3 your schedule, you've got almost two million dollars on equity  
4 in that property.

5 MR. GREENWALD: Your Honor, Mr. Fischman just provided  
6 me with a copy of an activity summary report for the efforts to  
7 sell it where there has been offers made and counters made. I  
8 will show it to Mr. --

9 THE COURT: What's the -- I want to go through this.  
10 What's the amount of debt that's on that property?

11 MR. GREENWALD: Two million one, Your Honor.

12 THE COURT: All right. And -- but it hasn't been  
13 sold?

14 MR. GREENWALD: Your Honor --

15 THE COURT: And there's no contract to sell it.

16 MR. GREENWALD: -- I can report that, according to a  
17 report that I'm holding from Hallstead, on October 15 -- let me  
18 phrase this. On October 15th, they lowered the price to two  
19 million 799. Then they got a bid on October 26th for two  
20 million. And they're maintaining that the sale price should be  
21 2.7. So apparently, they're looking for something in between  
22 which would carry -- which would cover the mortgage.

23 THE COURT: That doesn't yield much of anything for --  
24 toward anything else. So Yakaputz property, you have that  
25 listed at two million five on your schedule and you say there's

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1 a million five on the debt. That's -- two million five  
2 seventy-five is of debt. 195A Washington Park. Okay. What's  
3 the status of that? That's in foreclosure, correct?

4 MR. GREENWALD: Yes, Your Honor. That's been in  
5 foreclosure as we described. There is a term sheet which has  
6 been agreed to which would inject approximately 260,000 dollars  
7 into Yakaputz which would have the investor receive a fifty  
8 percent interest in Yakaputz and would enable Yakaputz to cure  
9 the default on the mortgage --

10 THE COURT: Okay.

11 MR. GREENWALD: -- and reinstate the mortgage.

12 THE COURT: Okay. You don't have to be in bankruptcy  
13 for that. The stay's already been lifted on that.

14 MR. GREENWALD: Your Honor --

15 THE COURT: So the bankruptcy's not helping you with  
16 that.

17 MR. GREENWALD: Your Honor, number one, the debtor had  
18 attempted -- had been trying to get the bank to do this for a  
19 long time and it had not. We now do have --

20 THE COURT: The bank to do what?

21 MR. GREENWALD: To agree to reinstate upon providing  
22 the dollar amount, the dollar to cure. So we are in a position  
23 to be able to cure it. If the bank is unwilling to  
24 reinstate --

25 THE COURT: Well, Yakaputz isn't in bankruptcy. You

1 could always put them in bankruptcy individually.

2 MR. GREENWALD: And, Your Honor, if we have to, that  
3 is what we'll do. We're looking to avoid having to do that.

4 THE COURT: Okay.

5 MR. GREENWALD: But we do have this -- we do have this  
6 deal.

7 THE COURT: Okay. There's no reason for Yakaputz --  
8 Mr. Fischman's bankruptcy is not adding anything to the  
9 Yakaputz situation.

10 MR. GREENWALD: Correct.

11 THE COURT: Okay. 886 Madison Street. That's --

12 MR. GREENWALD: On 886, there is a contract for the  
13 sale of the property which would be subject to a short sale.  
14 The buyer's negotiating with the bank which has otherwise been  
15 inactive in relation to that property. That we hope the buyer  
16 will have a deal with the bank so it can be sold. If not, we  
17 are contemplating going forward with a 363 sale so that the  
18 bank will then decide either it's going to bid in or it is  
19 going to --

20 THE COURT: Again, there is nothing about the  
21 bankruptcy that adds anything to this situation --

22 MR. GREENWALD: On that property.

23 THE COURT: -- because you cannot sell this property  
24 for less than the amount of the secured debt without the  
25 lender's permission in bankruptcy.



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1 MR. GREENWALD: Your Honor, I agree with you on that.

2 THE COURT: Okay. So that -- the bankruptcy adds  
3 nothing to do that. Or, there is no aspect of a reorganization  
4 of Mr. Fischman that is going to emerge from this property.

5 MR. GREENWALD: Except that it would reduce the amount  
6 of debt. The transaction we contemplate would hopefully reduce  
7 the amount of debt or recourse against Mr. Fischman by that  
8 lender.

9 THE COURT: But Mr. Fischman is going to get -- if  
10 he -- in a Chapter 7, he's going to get a discharge anyway.  
11 It's a short -- you're talking about a short sale. There's  
12 nothing about a short sale -- which, first of all, you can't do  
13 without the lender's permission. So there's no way that you  
14 can force them to do that in this bankruptcy. And it's not  
15 going to further the cause of your reorganization in this case.

16 Okay. Ford Hill Road. I guess you're not selling  
17 that at this point?

18 MR. GREENWALD: Your Honor, there are efforts to --  
19 there are continuing efforts to sell it. And there's an  
20 alternative they're considering: renting it as well.

21 THE COURT: Prevention I.

22 MR. GREENWALD: Forgive me, Your Honor. I apologize.

23 THE COURT: Renting -- is the mortgage current on Ford  
24 Hill Road?

25 MR. GREENWALD: Is the mortgage current on that?

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1 MR. CURTIN: No, Your Honor.

2 MR. GREENWALD: No, it is not.

3 THE COURT: Okay. Is the mortgage current on Madison  
4 Street?

5 MR. FISCHMAN: No.

6 MR. GREENWALD: No.

7 THE COURT: Is the mortgage current on -- I guess it's  
8 not on Yakaputz.

9 MR. GREENWALD: No.

10 MR. CURTIN: No.

11 THE COURT: Prevention I, 508 Madison Street.

12 MR. GREENWALD: That is current, Your Honor.

13 THE COURT: Well, what's the status of that property?

14 MR. GREENWALD: That property, that is the -- there is  
15 a contract for sale that has been circulated. And that would  
16 generate money to the estate.

17 THE COURT: How much -- what's the contract amount?

18 MR. GREENWALD: Approximately 175,000 dollars.

19 THE COURT: What's the amount of the secured claim?

20 (Pause)

21 MR. GREENWALD: That's 475, Your Honor.

22 THE COURT: The amount of the claim is 475.

23 MR. GREENWALD: Of the mortgage is 475.

24 THE COURT: Okay. And what is the amount of the  
25 proposed sale?

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1 MR. GREENWALD: I believe the amount of the sale is  
2 approximately 6.

3 MR. FISCHMAN: 690.

4 MR. GREENWALD: 690. So it'll be more than 475. It  
5 could be more than 175.

6 THE COURT: What about 572-574 Madison?

7 MR. GREENWALD: That is current, Your Honor. However,  
8 the debtor is considering selling it.

9 THE COURT: All right. But it's not under contract?

10 MR. GREENWALD: No.

11 THE COURT: Okay. 304 Washington Avenue.

12 MR. GREENWALD: 304 Washington. Your Honor had  
13 granted relief from the automatic stay to proceed up to sale.  
14 As Mr. Fischman testified, there were longstanding negotiations  
15 with this creditor. He is in a position to reinstate it.  
16 However, despite both of our efforts -- and I've been asking  
17 for months to get the amount of how much it takes to reinstate  
18 the mortgage -- how much cure to reinstate the mortgage and it  
19 has not been provided.

20 THE COURT: Have you done anything like -- is there a  
21 bar date set in this case?

22 MR. GREENWALD: Your Honor, yes, we did do a bar date.

23 THE COURT: Well, if you needed to get information  
24 from a creditor, you could get it -- you could come to court  
25 and seek that.

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1 MR. GREENWALD: Your Honor, we considered doing a 2004  
2 order. But based upon my relationship with Mr. Weiner, I  
3 believe we would hopefully be able to avoid that.

4 THE COURT: All right.

5 MR. CURTIN: Your Honor, I got a call from Mr. Weiner  
6 yesterday and he represented that there were offers made by the  
7 debtor and all those offers had been rejected and that they  
8 were proceeding to foreclosure in the beginning of December.

9 MR. GREENWALD: Those were different offers --

10 MR. CURTIN: That was as of last night.

11 MR. GREENWALD: That was not --

12 MR. CURTIN: That was last night, Your Honor.

13 MR. GREENWALD: That was not -- what was being  
14 discussed there, Your Honor, was not the issue of  
15 reinstatement. Your Honor, forgive me if I don't disclose what  
16 the settlement discussions were. But they did not go into  
17 reinstatement. There were actually more than introductory  
18 participations by Haven. So we are in a position to reinstate  
19 that mortgage.

20 THE COURT: You are in a position to. What do you  
21 mean?

22 MR. GREENWALD: Yeah. We will -- Mr. Fischman  
23 testified that he will have the money available to reinstate  
24 that mortgage to file the plan.

25 And in response to your question of when to file --

1 when we would be filing the plan, Your Honor, we had been  
2 working towards getting in a position where we can look to  
3 solve the economic problems of this case which is the real  
4 estate. We're now in a position to file a plan based upon the  
5 real estate transactions that have been described which include  
6 reinstatement, having profit -- being self-sustaining, selling  
7 properties, getting an investor in Yakaputz which will make  
8 that self-sustaining as well or more so sustaining and cure it.  
9 So we're now in a position to do a plan. And I can say that we  
10 can put a plan of reorganization before Your Honor within  
11 thirty days.

12 MR. CURTIN: Your Honor, I have to respond to this.  
13 Just with regard to 304 Washington, they're talking about  
14 having -- being in a position to reinstate the mortgage.  
15 There's no money, Your Honor. I don't know what they're  
16 talking about. They made some allusion to borrowing money from  
17 a friend of Mrs. Fischman's wife (sic). I don't know whether  
18 this is the same friend that -- the Court may have noticed that  
19 they attempted to -- attempting to retain to negotiate  
20 mortgages. Obviously, we would object to that if the case  
21 isn't converted.

22 But, Your Honor, these are all great points. But what  
23 it really comes down to is the debtor violated the order, cause  
24 exists and even if the Court were to determine that a plan  
25 could be confirmed within a reasonable time frame, the Court

1 would also have to find that there was a reasonable  
2 justification for disobeying the order. And all we have is  
3 that the orders went over his head.

4 THE COURT: Yeah.

5 MR. CURTIN: So it's a lot of talk about --

6 THE COURT: Um-hmm.

7 MR. GREENWALD: Your Honor, the -- my understanding is  
8 the person who is providing the financing is different than the  
9 former banker who they would like to have negotiate eight  
10 mortgages.

11 THE COURT: Is there anything else you want to put on  
12 the record?

13 MR. GREENWALD: If I can just speak one second with my  
14 client, Your Honor?

15 (Pause)

16 MR. GREENWALD: Your Honor, as I think we've  
17 discussed, there are buildings that are self-sustaining.  
18 Reorganization is feasible or can do -- is possible. It is  
19 premature to convert this case now because we're really talking  
20 about the Fischmans who have been in for a little more than  
21 five months, maybe just around five months. And they've been  
22 getting this case in order and are now in a position to do the  
23 plan. That the issue is are you able -- as far as conversion  
24 is concerned, generally, the issue is, is it possible to have a  
25 reorganization. And here, the answer is yes, it is.

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1 THE COURT: Well, I think the question -- that's not  
2 the standard in the statute.

3 MR. GREENWALD: I understand that.

4 THE COURT: It's not the standard in the statute as  
5 whether it's possible to have a reorganization.

6 MR. GREENWALD: Yes. Your Honor, I agree --

7 THE COURT: It's whether there's a reasonable  
8 likelihood that a plan will be confirmed within a reasonable  
9 time. And that is a higher standard than "possible", much  
10 higher.

11 MR. GREENWALD: Although the standard is based upon  
12 where you are in the context of the case. If this case was a  
13 year old then the standard is higher.

14 THE COURT: Six months into the case? That's long  
15 enough. That's long enough to have -- particularly, in the  
16 context -- you know, in the absence of a clause to convert the  
17 case, maybe there wouldn't -- I wouldn't be converting it  
18 necessarily just because you hadn't filed a plan at this point.  
19 But in the absence of -- given the existence of cause to  
20 convert the case then the burden falls on the debtor to make a  
21 showing.

22 MR. GREENWALD: Your Honor, then, if nec -- Your  
23 Honor, I would prefer to be able to file a plan in thirty days.  
24 But if I have to file a plan in two weeks, I'll do it.

25 THE COURT: You -- this motion was filed three weeks

1       ago, a month ago, right?

2               MR. CURTIN: Yes, Your Honor, a month ago.

3               THE COURT: A month ago. You had -- this is your  
4       opportunity to make that showing.

5               (Pause)

6               MR. GREENWALD: Your Honor, the -- as I said, I'm sure  
7       the Court is aware, the real estate market is a business. And  
8       that Mr. Fischman has been working very hard to try and sell  
9       these properties and hopefully generate some equity to pay  
10      creditors and maybe to keep himself going. A trustee -- a  
11      Chapter 7 trustee will not get anything more for these  
12      properties than will Mr. Fischman. It is not in the best  
13      interest of creditors to convert.

14              THE COURT: That isn't the standard either. Well,  
15      unless you say -- I guess it is whether it's in the best  
16      interest of creditors to convert or dismiss. The other  
17      possibility would be to appoint a Chapter 11 trustee.

18              MR. GREENWALD: Your Honor, I think that would be  
19      preferable to conversion.

20              THE COURT: You have a view on that, Mr. Curtin?

21              MR. CURTIN: Yes, Your Honor. I disagree. I think  
22      conversion, as outlined in the motion, is the most appropriate  
23      remedy. And as I mentioned, they're --

24              THE COURT: Why do you think it's preferable to  
25      appointing a Chapter 11 trustee?



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1 MR. CURTIN: Why do I --

2 THE COURT: Excuse me. Do you have anything else?  
3 I'm giving you now -- complete your remarks and sit down, if  
4 you would.

5 MR. GREENWALD: Thank you, Your Honor. It's my  
6 understanding that dismissal is not an option. If dismissal  
7 was an option, we would probably consent to dismissal. If we  
8 are looking at a liquidation or an 1104 trustee, we would  
9 prefer an 1104 trustee. Thank you, Your Honor.

10 (Pause)

11 MR. CURTIN: Your Honor, to answer your question,  
12 first of all, if the Court is inclined to appoint a Chapter 11  
13 trustee, obviously I'm not going to jump on the table about  
14 that. But we --

15 THE COURT: Well, I want to know your thinking --

16 MR. CURTIN: Yes.

17 THE COURT: -- about why you say conversion, not 11  
18 trustee, not dismissal.

19 MR. CURTIN: Well, there's a couple reasons, Your  
20 Honor. It really has to do with the numbers. And Your Honor  
21 touched on a lot of those. But this is a case where it doesn't  
22 seem -- and nobody has a crystal ball and can predict what will  
23 happen. But what it seems like is that these properties -- Mr.  
24 Fischman is a -- has a business other than these -- other than  
25 these buildings. And these buildings, quite frankly, based on

1 what the numbers show, need to be sold. And there's not --  
2 it's not a position -- it's not a case where, as Your Honor, I  
3 think, went through when you were questioning the debtor based  
4 on -- or Mr. Greenwald based on the schedules -- it's not a  
5 case where there's some what we sometimes refer to as a White  
6 Knight property where there's this ball of equity that can be  
7 used to pay off loans on some of the other properties. It's  
8 simply not that case.

9 And, Your Honor, I think, quite frankly, what would  
10 happen is if we appointed a Chapter 11 trustee, I think it  
11 would be converted pretty soon after that anyway.

12 THE COURT: Well, then why not -- why are you  
13 convinced that dismissal is inappropriate? Each of -- the  
14 assets of this entity consist of secured debt, basically, that  
15 is -- rather, properties that are subject to secured claims.

16 MR. CURTIN: Your --

17 THE COURT: There is unsecured debt, personal debt of  
18 Mr. and Mrs. Fischman, but, you know, I question whether they'd  
19 get much in a 7 anyway.

20 MR. CURTIN: Your Honor, you may be right. But my  
21 point is that it's worth a shot. It's worth a shot to convert  
22 the case, appoint a trustee. Your Honor, I've outlined ten  
23 pages of disclosed transactions that were inappropriate. Who  
24 knows what else there is? Who knows what causes of action  
25 exist for a trustee to pursue? And if there's nothing there,

1       there's nothing there. But it's not a case in our view that  
2       should simply be dismissed. And quite frankly, I don't know  
3       that benefit is sufficient. I think out of the three,  
4       dismissal is probably the worst for them. But that's not my  
5       place to say. And we ask for conversion. A trustee -- and if  
6       the trustee -- the Chapter 7 trustee wants to operate, there's  
7       obviously a means for him or her to do that.

8               THE COURT: All right. Did you want to say something?

9               MR. NAGI: Yes, Your Honor. Jason Nagi on behalf of  
10       City National Bank. With respect to the three properties, City  
11       National Bank has a secured collateral.

12              THE COURT: And which are those?

13              MR. NAGI: That's 866 Madison Avenue. That's the one  
14       where there's a proposed short sale.

15              THE COURT: Uh-huh.

16              MR. NAGI: Prevention I, which is 508 Madison Avenue.  
17       And then 572-574 Madison Avenue where there's no contract. But  
18       the one thing that we would like to point out is that four  
19       months on Prevention -- for four weeks, there's been a contract  
20       on Prevention Inc. Nothing has been showed to the Court. So  
21       we've heard talk about it but --

22              THE COURT: So your client has a mortgage on all three  
23       properties?

24              MR. NAGI: On all those three properties.

25              THE COURT: Is it to secure -- are they separate

1 mortgages or one that covers all three?

2 MR. NAGI: They're separate mortgages.

3 THE COURT: Okay. And are you the senior lender on  
4 these properties?

5 MR. NAGI: We are. I don't believe that there's a  
6 second lien lender but I've had this case for about a day and a  
7 half so it's really hard to --

8 THE COURT: All right.

9 MR. NAGI: -- to get all the facts in time for this  
10 hearing.

11 THE COURT: Okay. Continue what you were going to  
12 say.

13 MR. NAGI: Sure. We fully intend to be involved. And  
14 from what it looks like, I think that City National Bank would  
15 be inclined to move to lift the stay for these properties  
16 because we do not believe that there is a reorganization that's  
17 reasonably within prospect within a reasonable amount of time.  
18 And that's really all that I would like to add to the Court at  
19 this time.

20 THE COURT: All right.

21 MR. NAGI: If I may just approach to provide my card.  
22 I can do it after if Your Honor would like.

23 THE COURT: Why don't you wait?

24 MR. NAGI: Sure.

25 THE COURT: All right. Anybody else want to say

1 anything?

2 MR. CURTIN: No, Your Honor.

3 MR. GREENWALD: If I may?

4 THE COURT: Yes.

5 MR. GREENWALD: To be very brief. If we can have a  
6 month to put this together, adjourn Your Honor's decision so we  
7 can do what we say we're going to do -- and we'll, of course,  
8 work with counsel, the U.S. trustee's office. So this way we  
9 can make the motions, we'll get the plan of reorganization.

10 THE COURT: Okay.

11 MR. GREENWALD: Thank you.

12 THE COURT: All right. This is my ruling on the  
13 United States trustee's motion to convert or dismiss Mr. and  
14 Mrs. Fischman's individual case. I think the record clearly  
15 shows that the trustee has demonstrated that there is cause to  
16 convert or dismiss this case as outlined in Section 1112(b)(4)  
17 in that there was failure by the debtor to comply with two  
18 orders of the Court. The argument is made that they were  
19 complied with but complied with late. As to one of them, I  
20 don't believe it was complied with at all but if it was  
21 complied with, it was complied with two months late. And the  
22 other one, the same is true. If there was compliance, it was  
23 substantially late. And the order set a deadline. The  
24 deadline had to be complied with. As with respect to -- I  
25 should say -- the second order, I guess, was the order that

1 required reporting as to Carriage House. And that was never  
2 complied with except, I guess, to the extent that Mr. Greenwald  
3 may have included the information in the response to the  
4 motion. But in either event, there was not compliance with the  
5 terms of the order. And -- so there is cause as outlined in  
6 Section 1112(b)(4) to convert or dismiss this case. No  
7 question about it. It is crystal clear on the record that  
8 there has been a failure to comply with an order of the Court  
9 and not a one-day mistake but a multiple-day mistake, multiple-  
10 day failure to comply.

11 And disclosure in the context of a Chapter 11 case,  
12 particularly a case where the debtor owns multiple properties  
13 in multiple entities commingles funds where there has been  
14 history of funds going back and forth -- disclosure is key.  
15 And that is why these orders were entered. And they were not  
16 complied with. And that is conceded.

17 So that that leaves us to the question of whether the  
18 debtor has established that there is a basis under Section  
19 1112(b)(2) to not con -- to defer or not to convert the case or  
20 to dismiss the case based on satisfaction of the prongs under  
21 1112(b)(2)(A) and (B). And 1112(b)(2)(B) requires that in  
22 order to avoid the mandatory consequence of conversion or  
23 dismissal, the debtor has to establish or some other party has  
24 to establish that the grounds for relief include an accurate  
25 omission for which there exists a reasonable justification for

1 the act or omission and that will be cured within a reasonable  
2 period of time.

3 I don't find that the debtor saying that the orders  
4 went over his head, that he blanked out on them, that he didn't  
5 understand is a reasonable justification. Mr. Fischman is a  
6 Chapter 11 debtor. He's undertaken the responsibility to  
7 function as a debtor-in-possession and he is held to that  
8 standard. He is assisted by two professionals, by an attorney  
9 and an accountant. The idea that he thinks that he can tell me  
10 that it just went over his head and that is somehow going to be  
11 a reasonable excuse for not complying with an order is simply  
12 an unacceptable excuse. And I don't consider that to be an  
13 excuse that constitutes a reasonable justification for failure  
14 to comply with two separate court orders requiring reporting.

15 Nor do I believe that Mr. Fischman's testimony has  
16 established that there is a reasonable likelihood that a plan  
17 will be confirmed within a reasonable time. He has talked  
18 about various real estate transactions that he is contemplating  
19 although there's been no documentary proof that substantiates  
20 any of -- that proffers -- that substantiates any of the  
21 testimony that he's made concerning transactions that he  
22 thinks -- that he hopes to enter into is, I'd say, speculative  
23 at this point. And it is entirely unclear whether any of these  
24 transactions will either be accomplished or whether they would  
25 yield any benefit that would be able -- that would make it

1 possible for the debtor to reorganize. And certainly no  
2 outline has been proffered as to how that would -- how that  
3 exactly that would accomplish, what would be paid to unsecured  
4 creditors, anything of that nature. So I think that the  
5 testimony that's proffered, the unsubstantiated testimony  
6 that's been proffered does not satisfy, in my view, the  
7 requirement of establishing that there is a reasonable  
8 likelihood that a plan will be confirmed within a reasonable  
9 time.

10 For that reason, I am granting the motion by the  
11 United States trustee. And I agree with the United States  
12 trustee that, in these circumstances, conversion is the more  
13 appropriate alternative. I think that there -- although I  
14 would consider the possibility of a Chapter 11 trustee, I think  
15 there is probably -- it probably doesn't make much of a  
16 difference because a Chapter 7 trustee, as Mr. Curtin has --  
17 this is really a liquidating case either way. So a Chapter 7  
18 trustee can operate the business and a Chapter 11 trustee can  
19 sell assets. So in this instance, I think that since this is  
20 really fundamentally a liquidating case that it is appropriate  
21 to appoint a Chapter 7 trustee.

22 MR. GREENWALD: Your Honor, Mr. Fischman asked if he  
23 could address the Court.

24 THE COURT: I've made my ruling.

25 MR. GREENWALD: Okay. Thank you. Mr. Fischman had



1 indicated to me that if Your Honor granted the relief you have  
2 that he would want to take an appeal. Accordingly, I'd ask the  
3 Court would grant a stay pending appeal.

4 THE COURT: You will have to explain to me why there  
5 would be grounds for a stay pending appeal.

6 MR. GREENWALD: Well, there would be substantial  
7 prejudice to the debtor if the trustee were to come and take  
8 hold and start selling properties before the appeal was  
9 determined. The actions by a Chapter 7 trustee can regularly  
10 render the decision on appeal moot and make the appeal  
11 dismissible for moot. So there's substantial prejudice to the  
12 debtors by not maintaining the status quo.

13 THE COURT: So you think a Chapter 7 trustee is going  
14 to come in and sell things tomorrow?

15 MR. GREENWALD: I do not think a Chapter 7 trustee  
16 will come and sell things tomorrow. However, considering how  
17 long appeals can take, it is possible that sales will occur  
18 before then or the trustee might take action which would impact  
19 upon existing deals and the debtors well-being in the meantime.

20 THE COURT: I'm going to respectfully deny this --  
21 well, I'll hear from Mr. Curtin. Mr. Curtin, what's your view  
22 on a stay pending appeal?

23 MR. CURTIN: Your Honor, we oppose it. And the prong  
24 that hasn't been addressed is the reasonable likelihood of  
25 success. And I would submit that based upon Your Honor's

1 ruling, it's cut and dry. There is no reasonable likelihood of  
2 success. There really is no possibility of success in our  
3 position. So, Your Honor, for those reasons -- Your Honor  
4 would have to find both that and the harm. So you don't even  
5 need to get to the harm if you don't find the reasonable  
6 likelihood.

7 THE COURT: Well, I think that Mr. Curtin is correct  
8 that there is not a reasonable likelihood of success nor even a  
9 fair prospect of success on appeal given the fact that there  
10 has been clear noncompliance with orders of the Court. So  
11 there is admittedly, I think -- there's been admitted that  
12 there is noncompliance. So I think there's clearly grounds  
13 under 1112(b). And it is, to me, equally clear that for the  
14 debtor-in-possession to say that orders of the Court went over  
15 his head or that he blanked out or something of that nature  
16 does not constitute a reasonable justification for a failure to  
17 comply with an order of the Court.

18 MR. GREENWALD: Your Honor --

19 THE COURT: So --

20 MR. GREENWALD: -- in which case? If Mr. Fischman --

21 THE COURT: Nor do I think that there is an immediate  
22 prospect of irreparable harm if a Chapter 7 trustee is  
23 appointed because I know that the debtor will be able to  
24 communicate with the Chapter 7 trustee. If the debtor feels  
25 that there is a transaction that the debtor thinks would be

1 more favorable for the estate, you can make a motion at that  
2 point. So I don't -- you can seek Court approval. You can  
3 seek --

4 MR. GREENWALD: If there's a motion for a sale, the  
5 debtor can object to it.

6 THE COURT: Can object to it.

7 MR. GREENWALD: I understand.

8 THE COURT: If the debtor has a transaction, the  
9 debtor can propose that transaction. Debtor can seek  
10 reconversion to an 11 if you have a plan.

11 MR. GREENWALD: Your Honor, again, Mr. Fischman asks  
12 if he can address Your Honor.

13 MR. FISCHMAN: I have something I would like to say,  
14 Your Honor.

15 THE COURT: All right.

16 MR. FISCHMAN: Do I need to go into that place or -- I  
17 would just like to say that I feel I'm being denied due  
18 process. And as a result of that, I'm going to file an appeal  
19 with an interlocutory -- it's going to be an interlocutory  
20 adversary appeal that I'll be filing because I feel I am not  
21 being granted due process here. We are in the process of  
22 getting things done. We're in the process of solving this 11  
23 and we're not being given the time. I feel I'm not being given  
24 due process here, Your Honor. And for that reason, unless Your  
25 Honor will reconsider, I will be filing an appeal and it will

1 be an interlocutory adversary appeal. So I would like Your  
2 Honor to reconsider this and give us at least one more month to  
3 bring to fruition everything we say we can do.

4 THE COURT: I'm not changing my ruling.

5 MR. FISCHMAN: I'm sorry?

6 THE COURT: I am not changing my ruling.

7 MR. GREENWALD: Your Honor, I appreciate Your Honor  
8 considering the motion for the stay pending appeal.

9 Considering that Your Honor has denied it --

10 THE COURT: I have denied it, yes.

11 MR. GREENWALD: -- if Mr. Fischman seeks a stay  
12 pending appeal, he would like to go directly to the district  
13 court as opposed to having to first come here which Your Honor  
14 has already denied the motion.

15 THE COURT: Yes.

16 MR. GREENWALD: So we may go directly to the district  
17 court?

18 THE COURT: Yes, you may.

19 MR. GREENWALD: Thank you very much, Your Honor.

20 THE COURT: All right. Mr. Curtin, will you submit  
21 your order, please?

22 MR. CURTIN: Your Honor, I submitted one with the  
23 motion. But I can submit another one.

24 THE COURT: Do you need to -- I mean, have we received  
25 it in electronic form?

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1 (Pause)

2 MR. CURTIN: Your Honor, I can upload it right when I  
3 get back.

4 (Pause)

5 THE COURT: All right. Okay. Thank you.

6 MR. CURTIN: Thank you, Your Honor.

7 MR. GREENWALD: Your Honor, thank you again.

8 THE COURT: No. I'm just converting the Fischman  
9 case. They will be under the jurisdiction of the trustee.

10 (Whereupon these proceedings were concluded at 5:22 p.m.)

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## I N D E X

## T E S T I M O N Y

WITNESS	EXAM BY	PAGE	LINE
Michael Fischman	Mr. Greenwald	24	5
Michael Fischman	Mr. Curtin	46	1
Michael Fischman	Mr. Greenwald	55	1

## R U L I N G S

DESCRIPTION	PAGE	LINE
Motion of the Chapter 11 trustee to convert the case (no. 10-44189) to Chapter 7 granted; Chapter 7 trustee will be appointed	80	10 21
Motion to lift stay pending appeal denied; debtor may go directly to district court and not have to come first to bankruptcy court	84 84	10 18

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C E R T I F I C A T I O N

I, Lisa Bar-Leib, certify that the foregoing transcript is a  
true and accurate record of the proceedings.

\_\_\_\_\_  
LISA BAR-LEIB (CET\*\*D-486)  
AAERT Electronic Certified Transcriber

Veritext  
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Suite 580  
Mineola, New York 11501

Date: November 10, 2010